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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
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Billed Party Preference for)
InterLATA 0- Calls)
_____)

CC Docket No. 92-77

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PETITION FOR PARTIAL RECONSIDERATION OR CLARIFICATION
OF THE INMATE CALLING SERVICE PROVIDERS COALITION

April 9, 1998

Albert H. Kramer
Robert F. Aldrich
Jacob S. Farber
DICKSTEIN SHAPIRO MORIN
& OSHINSKY LLP
2101 L Street, N.W.
Washington, D.C. 20337-1526
(202) 785-9700

Attorneys for Inmate Calling Services
Providers Coalition

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**PETITION FOR PARTIAL RECONSIDERATION OR CLARIFICATION
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The Inmate Calling Service Providers Coalition ("ICSPC") respectfully petitions for partial reconsideration or clarification of the Commission's *Second Report and Order and Order on Reconsideration*, FCC 98-9 (released January 29, 1998) in the above captioned proceeding (the "*Order*"). ICSPC previously participated in this proceeding.¹

Statement of Interest

ICSPC is an ad hoc coalition of companies that provide highly specialized telephone equipment and services to inmates in confinement facilities. ICSPC's members range in size from the nation's largest independent provider of inmate calling service ("ICS") to small companies serving only a handful of confinement facilities. They share in common the desire to offer the highest possible level of service to confinement facilities and inmate callers at rates that are fair, while providing a reasonable return on investment.

¹ ICSPC filed comments on July 17, 1996, reply comments on August 16, 1996, an *ex parte* letter on September 9, 1996, and supplemental comments on November 13, 1996.

Introduction and Summary

ICSPC is seeking partial reconsideration or clarification of the *Order* out of an abundance of caution. The Commission has pending before it a remand of its *Payphone Orders*² from the U.S. Court of Appeals for the D.C. Circuit. One of the principal issues in that proceeding is the Commission's failure to ensure that ICS providers are fairly compensated for local and intraLATA inmate calls, as required by Section 276 of the Communications Act of 1934, as amended.³ ICSPC is concerned that the certain statements in the *Order* are inconsistent with the Commission's Section 276 mandate and may adversely affect the Commission's ability in the payphone proceeding to correct its failure to prescribe fair compensation for ICS providers. ICSPC wants to be sure that misconception of the Commission's obligation under Section 276 reflected in the *Order* does not go uncorrected when the Commission addresses the issue of fair compensation in the remand proceeding.

As ICSPC demonstrated in its comments in the payphone proceeding, ICS providers are prevented from receiving fair compensation for many local and intraLATA calls because a majority of states have rate ceilings in place that limit rates for those calls to standard collect rates, notwithstanding the considerable additional costs of providing

² See *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act*, 11 FCC Rcd 20541 (1996) ("*Payphone Order*"), recon. 11 FCC Rcd 21233 (1996) ("*Payphone Reconsideration Order*").

³ 47 U.S.C. § 276.

service in the confinement facility environment. As a result of those artificially low state rate ceilings, many ICS providers are losing money on local and intraLATA calls made from their facilities. ICSPC demonstrated that in order to comply with its obligation under Section 276 to provide fair compensation for all calls, the Commission must address the noncompensatory state rate ceilings. ICSPC proposed that the Commission prescribe a \$.90 “inmate calling system element” that would have made local and intraLATA calls compensatory given the existing state rate ceilings. The Commission, however, rejected ICSPC's proposal, leaving the problem of noncompensatory state rates completely unaddressed.

Although ICSPC specifically raised the Section 276 issue in this proceeding, the Commission's discussion of inmate service rates is at odds with its obligation under Section 276. Indeed, in portions of the *Order* the Commission appears to sanction noncompensatory state rate ceilings. In discussing why it chose not to require rate disclosure for intrastate operator service providers, the Commission stated:

As requested by Citizens United for Rehabilitation of Errants (C.U.R.E.) with regard to intrastate rates for collect calls from prisons, we also make clear that our action herein similarly does not preempt state rate caps that may be lower than any rate benchmark proposals for interstate operator services considered, but not adopted in this proceeding. We note, however, that some commenters believe that interstate telecommunications services ratepayers should subsidize providers of operator services whose intrastate operator service rates and surcharges have been capped by a state at a level that is alleged to be “unfair” or which precludes recovery of the carrier's alleged “reasonable” costs and profits. Any such subsidy or cross-subsidization would inhibit competition at the intrastate level, contrary to our policies encouraging competition in all telecommunications markets. We are unaware of any public policy

reason why users of interstate operator services should be required to subsidize users of intrastate operator services.⁴

To the extent that the Commission did intend to sanction noncompensatory state rates, the above-quoted language conflicts with Section 276's directive that the Commission ensure "fair compensation" for inmate calls. Given the Commission's acknowledged failure to address the state rate ceilings in the *Payphone Orders*, the Commission cannot suggest that state rate ceilings are not fully compensatory could be consistent with Section 276. If the Commission did not intend to sanction noncompensatory state rate ceilings, then it must make that clear.

In addition, the above-quoted portion of the *Order* states that Commission policy prohibits the cross-subsidization of intrastate rates with interstate rates. Similarly, in discussing its rate disclosure requirement for ICS providers, the Commission stated that:

[J]ust as it would be contrary to our policies encouraging competition in all telecommunications markets to have intrastate operator services from aggregator locations subsidized, it would similarly be an undue burden on interstate commerce to have costs of providing intrastate service to prison inmates cross-subsidized by interstate service ratepayers.⁵

To the extent that the Commission allows noncompensatory state rates to continue, this policy of barring cross-jurisdictional subsidization is inconsistent with the Commission's obligation under Section 276 to ensure that ICS providers are fully compensated for all calls.

⁴ *Order* ¶ 55 (citations omitted).

⁵ *Id.* ¶ 61 (citations omitted).

Discussion

I. The Commission Failed to Meet Its Obligation in the Payphone Proceeding to Ensure "Fair Compensation" For Inmate Calls, As Required by Section 276

Section 276 directed the Commission to "establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed interstate and *intrastate* call."⁶ Thus, Congress was clear that it intended for the Commission to affirmatively address compensation for intrastate calls where necessary to ensure fair compensation. The Commission, however, failed to meet that obligation with respect to inmate local and intraLATA calls.

In the payphone proceeding, the Commission determined that "fair compensation" means the level of compensation set by the market.⁷ The Commission also made clear, however, that this is true only where the market is functioning properly: "where the market does not or cannot function properly . . . the Commission needs to take affirmative steps to ensure fair compensation"⁸ Specifically, the Commission said it would address the issue of compensation where a "government-mandated rate . . . may not be high enough to be 'fairly' compensatory."⁹

⁶ 47 U.S.C. § 276(b)(1)(A) (emphasis added).

⁷ Payphone Order ¶ 49 ("[O]nce competitive market conditions exist, the most appropriate way to ensure that PSPs receive fair compensation for each call is to let the market set the price for individual calls originated on payphones.").

⁸ *Id.*

⁹ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Notice of Proposed Rulemaking*, 11 FCC Rcd 6716 (1996), ¶ 18 n.54.

Inmate local and intraLATA calling rates fall into the category of rates where a “government-mandate” prevents the rate from providing fair compensation. State rate ceilings prevent ICS providers from receiving fair compensation that reflects the unique costs of providing inmate service. As ICSPC demonstrated in its comments, most states have imposed ceilings on inmate local and intraLATA calling rates. Attached hereto as Exhibit 1 is a table that shows that at least 30 states have placed some form of ceiling on local and intraLATA inmate calling rates.

The mere existence of those state ceilings does not in and of itself justify Commission intervention in the market. Were those ceilings set high enough to permit recovery of the ICS provider’s cost of doing business in the inmate environment, they arguably would provide “fair compensation.”

That, however, is not the case. In nearly every instance, the local and intraLATA rate ceilings are based on the incumbent LEC’s (or, in a few cases, AT&T’s) regular non-inmate collect call rates.¹⁰ In other words, in those states, ICS providers are forced to charge the same rates for calls from their inmate calling systems as the LEC charges for a regular collect call from any residential or business phone. The ICS rates include no element whatsoever to recover fair compensation for the unique costs of providing inmate service over and above the costs of providing regular collect service.

¹⁰ See Exhibit 1. Moreover, even in states that do not have a formal rate ceiling in place on local and intraLATA calls, political pressures dictate that ICS providers nevertheless must often charge the incumbent LEC’s regular non-inmate rates.

As ICSPC explained at length in its comments in the payphone proceeding, it is far more expensive to provide the integrated package of services and equipment necessary for inmate calling than it is to provide general payphones.¹¹ On at least three separate occasions, the Commission has allowed tariffs quantifying those unique costs of providing inmate service at \$.90 per call to take effect without challenge by accepting the tariffs filed by each of the "Big Three" IXC's (AT&T, MCI, and Sprint) for their inmate calling service. In each case, the package of services offered under the tariff was the same as the package offered by the typical ISP, and in each case, the tariff contained an operator service surcharge for inmate calls \$.90 higher than the carrier's operator surcharge for non-inmate calls, reflecting the higher costs associated with inmate calling.

Yet, as ICSPC pointed out in its comments, state ceilings on inmate local and intraLATA calls are typically "based on incumbent local exchange carriers' ("LECs") standard 0+ collect calling service rates."¹² Those rates thus fail to take into account the considerable costs unique to the inmate environment and thus prevent ICS providers from receiving fair compensation.

¹¹ See ICSPC Comments, CC Docket 96-128 (filed ___) at 6-13. Three factors contribute to the unique costs of providing inmate calling services. First, the specialized inmate calling systems developed by ICS providers to meet the call control and monitoring needs of confinement facilities require significant capital investment. *Id.* at 7-11. Second, the level of bad debt associated with calls from confinement facilities is several times higher than from public payphones. *Id.* at 12. Third, labor expenses are high because ICS providers must maintain a customer service staff equipped to address the needs of inmates, the inmates' called parties, and the confinement facilities. *Id.* at 12-13.

¹² Comments of ICSPC, CC Docket 96-128 (filed ___) at 5.

Cost data from the independent ICS providers operating the majority of the county jails in North Carolina makes abundantly clear the effects of these artificially low local and intraLATA inmate rate ceilings. That data, attached as Exhibit 2 hereto, shows that, as a result of the rate ceilings in place in North Carolina, the ISP are losing \$.46 on every local call and \$1.10 on every intraLATA call. As shown by the chart attached hereto as Exhibit 3, local calls represent 73% of the calling traffic and intraLATA calls 12%. Thus, the North Carolina ICS providers are losing money on 85% of their calls. North Carolina's relative volume of local and intraLATA calls is typical of calling patterns from local and county jails.

To remedy the situation, ICSPC proposed that the Commission prescribe a \$.90 per-call inmate system element to compensate ICS providers for the unique costs of providing the equipment and services necessary for inmate calling, without the Commission having to interfere with state rates. As discussed above, the Commission has already allowed the \$.90 element to go into effect in conjunction with each of the Big Three's inmate calling services and thus has implicitly recognized it as providing fair compensation and recovery of the costs of providing such services.

The Commission did not question the validity of the \$.90 figure but, notwithstanding the record before it explaining the unique nature and costs associated with inmate calling service, concluded that there was no basis for according ICS providers

different treatment from public payphone providers.¹³ The Commission did not explain how ICS providers could be fairly compensated in light of the state rate ceilings. Instead, the Commission simply passed the buck to the states:

We note that, in response to their arguments about state-mandated intrastate toll rate ceilings, the inmate petitioners may remind the states that Section 276's mandate that [payphone service providers] be fairly compensated for all payphone calls is an obligation that is borne both by us and the states. If an inmate provider believes, after making its arguments to a particular state in light of Section 276 and the instant proceeding, that it is not receiving fair compensation for intrastate toll calls originated by its inmate payphones, it may petition the Commission to review the specific state regulations of which it complains.¹⁴

This interpretation of the Commission's mandate under Section 276—that the states, not the Commission, have primary responsibility for ensuring fair compensation—is a novel one. Section 276 makes no mention of, and the Commission cited no authority for, the proposition that the states were given any role by Congress in ensuring compensation.

The Commission has acknowledged that it failed to address the arguments raised by ICSPC. ICSPC filed a petition for review of the *Payphone Orders* with the U.S. Court of Appeals for the District Columbia Circuit on January 22, 1997. After ICSPC filed its initial brief in the proceeding, the Commission, on December 12, 1997, requested a voluntary remand of the proceeding “to allow the Commission to consider arguments

¹³ *Payphone Reconsideration Order* at 21269 (citing the *Payphone Order* for the proposition that the Commission had decided therein to “treat inmate payphones in the same manner as all other payphones”).

¹⁴ *Id.*

made in the petitioner's opening brief."¹⁵ Among those arguments was ICSPC's contention that the Commission erred "by failing to prescribe a special compensation charge for [ICS providers.]" The Commission acknowledged that it "did not address some of [ICSPC's] arguments in detail in the orders on review."¹⁶ The Commission therefore asked the Court to "remand the case to permit it to do so now."¹⁷ The Court granted the Commission's request for a remand on January 30, 1998. The proceeding, including the issue of fair compensation for ICS providers, is now pending before the Commission.

II. The Commission Must Take Into Account in this Proceeding Its Failure to Address the State Rate Ceilings in the Payphone Proceeding

A. The Commission Cannot Sanction Noncompensatory State Rates

ICSPC is concerned that not only did the Commission's *Payphone Orders* fail to provide fair compensation for ICS providers in light of the state rate ceilings, but the instant *Order* may have worsened matters. The language in the *Order* quoted above appears to sanction state rate ceilings that prevent ICS providers from receiving fair compensation. At the very least, the *Order* reflects no recognition on the part of the Commission of its obligation under Section 276 to ensure fair compensation for local and intra-ATA inmate calls in light of the state rate ceilings.

¹⁵ Motion of Federal Communications for Voluntary Remand, Case No. 97-1046 (filed December 12, 1997) at 1.

¹⁶ *Id.*

¹⁷ *Id.*

While not entirely clear, that portion of the *Order* can be read to say that the Commission believes that the states are free to set rate ceilings on local and intraLATA calls at levels which do not permit ICS providers to recover fair compensation for those calls. This, however, may not have been what the Commission intended. Instead, it is possible to read the quoted language as applying not to “unfair” noncompensatory rates, but only to rates that have been *alleged* to be so but in fact are not. If that is the case, then the Commission must clarify the *Order* to make it clear that the Commission is not sanctioning state rate ceilings which prohibit ICS providers from receiving fair compensation.

If the Commission did intend to sanction state rate ceilings that prevent ICS providers from recovering fair compensation, then that portion of the *Order* is unlawful. Section 276 requires the Commission to ensure “fair compensation for each and every completed intrastate and interstate call” from payphones, including inmate calls. ICSPC has demonstrated that the state rate ceilings which do not permit ICS providers to so much as recover their costs, much less a reasonable return on their investment, make it impossible for ICS providers to receive “fair compensation” for local and intraLATA calls. The Commission already violated Congress’ directive by abdicating to the states its responsibility for correcting the rate ceiling problem. The Commission may not compound that error by suggesting that it sanctions those rate ceilings. Doing so not only violates Section 276 but may also have the unintended consequence of tying the Commission’s hands in the payphone remand proceeding. After having acknowledged that it did not adequately address fair compensation for ICS providers and requesting a remand of the

issue, the Commission cannot set policies in this proceeding inconsistent with that obligation.

B. The Commission Must Recognize that as Long as There Is an Artificial Ceiling on State Rates, There Will Be Cross-Jurisdictional Subsidies

Because rate ceilings have kept local and intraLATA rates artificially low and, in many cases, below cost, ICS providers have been forced to look to interstate rates to make up their losses on intrastate calls.¹⁸ If the Commission had prescribed per-call compensation for those intrastate calls as ICSPC suggested, it would have relieved that pressure on interstate rates. Having failed to do so, the Commission must recognize that, as long as there are artificial caps on state rates, some subsidy is inevitable. While the Commission may be correct that such subsidies are a “burden on interstate commerce,”¹⁹ it is the Commission, not ICS providers that has allowed the subsidies to continue by failing to address the underlying problem of the noncompensatory state rates.

In any case, it is well established that regulatory commissions may not close their eyes to the interdependency of interstate and intrastate rates. *Conway Corp. v. Federal Power Commission*, 510 F.2d 1264 (D.C. Cir. 1975), *aff’d* 426 U.S. 271 (1976). Where, as here, the Commission has an affirmative duty pursuant to Section 276 of the Act to ensure fair compensation for *all calls*, the *Conway* principle applies even more strongly.

¹⁸ The Commission should not be under the illusion that ICS providers can come anywhere near being able to completely recover their losses on intrastate calls through their interstate rates. As the Commission recognized, interstate calls constitute a small percentage of independent ICS traffic. *Order* ¶ 61 (noting that “most calls by prison inmates appear to be intrastate rather than interstate”).

Any policy that attempts to prevent competition-inhibiting or “burdensome” subsidies is invalid unless it addresses the root cause of the subsidy—namely state rate ceilings that preclude fair compensation for inmate service providers.

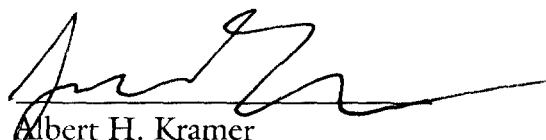
Conclusion

The Commission should reconsider or clarify the *Order* to the extent described above.

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Respectfully submitted,

DICKSTEIN SHAPIRO MORIN
& OSHINSKY LLP
2101 L Street, N.W.
Washington, D.C. 20037-1526
(202)785-9700
*Attorneys for Inmate Calling Service
Providers Coalition*



Albert H. Kramer
Robert F. Aldrich
Jacob S. Farber

¹⁹ *Order* ¶ 61